

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO. 668 OF 2008

Shriram S/o Nathu Jadhav,
Aged about 23 years, Occ. Farmer,
R/o Ashwinpur Tanda, Tah. Pusad,
District Yeotmal.
(at present Yavatmal Jail).

...APPELLANT

Versus

State of Maharashtra,
through P.S.O., P.S. Pusad (City),
Tah. Pusad, District Yeotmal.

...RESPONDENT

Shri Abhishek S. Shukla, Advocate for the appellant.
Shri M.J. Khan, A.P.P. for the respondent.

.....

CORAM : PUSHPA V. GANEDIWALA, J.

ARGUMENTS WERE HEARD ON : JANUARY 18, 2021

JUDGMENT IS PRONOUNCED ON : FEBRUARY 24, 2021

JUDGMENT :

The challenge in this appeal under Section 351 of the Code of Criminal Procedure (hereinafter to be referred as the "Code") is to the judgment dated 30/06/2008 in Misc. Criminal Application No. 135/2008 arose out of the Sessions Trial No. 34/2007 (State Vs. Santosh) by the Adhoc Additional Sessions Judge, Pusad, whereby the appellant was tried summarily and convicted for the offence of 'perjury' under Section 344 of the Code, and is sentenced to suffer simple imprisonment for three months

and to pay fine of Rs.200/- (rupees two hundred only), in default of payment of fine, to suffer simple imprisonment for 15 days.

2. Brief facts leading to the present appeal are as under :

i. On 08/03/2007, the appellant lodged a report at the Police Station, Pusad, stating therein that the accused, i.e., his brother, committed murder of deceased Kiran (sister in law of the accused and the appellant) with an 'axe'. Crime No. 58/2007 came to be registered against the accused, and after investigation, the charge sheet came to be filed, and the case was committed to the Sessions Court, Pusad. It was tried as Sessions Trial No. 34/2007, which resulted into acquittal of the accused mainly on the ground that the star witness, i.e., the appellant, who was the informant and the sole eye-witness to the alleged murder, turned hostile.

ii. In the judgment, the learned trial Court observed that the appellant had intentionally given false evidence to save his brother from the charge of murder. The learned trial Court, in the said judgment, also recorded its satisfaction that it is necessary that the appellant should be tried summarily for giving false evidence. The learned trial Court took cognizance of the offence of perjury, and issued a show cause notice and summons to the appellant as to why he should not be punished for giving false evidence under Section 344 of the Code.

3. In response to the show cause notice and the summons, the appellant appeared before the Court and submitted his written explanation stating therein that due to police pressure and threats of involving himself in the offence of murder, he has stated so before the Police and the Magistrate. The learned trial Court found it unreliable and proceeded for summary trial. The learned Court filled up the summary sheet and explained the particulars of the offence to the appellant to which he pleaded not guilty. The learned trial Court recorded his plea, and after hearing the counsel appearing on behalf of the appellant, convicted the appellant for the offence of perjury and sentenced him as above. This judgment is impugned in the present appeal.

4. Shri Shukla, learned counsel appearing on behalf of the appellant, mainly argued on the following three points :

- a. The learned trial Court, while delivering judgment, failed to record the substance of evidence, which is mandatory in a summary trial if the accused pleads not guilty.
- b. The learned trial Court failed to give an opportunity to the appellant to prove his defence.
- c. The learned trial Court failed to record the finding with regard to which of the statements of the appellant was false.

5. As against this, Shri Khan, learned A.P.P. appearing on behalf of the State, while supporting the impugned judgment of the trial Court submitted that the trial Court has followed due procedure as contemplated in law. The learned A.P.P. urged for dismissal of the appeal.

6. I have considered the submissions on behalf of both the sides, and perused the record.

7. Without going into the merits of the case, first and foremost, it is necessary to examine as to whether the learned trial Court has followed the procedure as contemplated in law for convicting the appellant under Section 344 of the Code, and whether any prejudice is caused to the appellant if the same is not followed. For ready reference, Section 344 of the Code is reproduced below :

“344. Summary procedure for trial for giving false evidence.- (1) If, at the time of delivery of any judgment or final order disposing of any judicial proceeding, a Court of Session or Magistrate of the first class expresses an opinion to the effect that any witness appearing in such proceeding had knowingly or wilfully given false evidence or had fabricated false evidence with the intention that such evidence should be used in such proceeding, it or he may, if satisfied that it is necessary and expedient in the interest of justice that the witness should be tried summarily for giving or fabricating, as the case may be, false evidence, take cognizance of the offence and may, after giving the offender a reasonable opportunity of showing cause why he should

not be punished for such offence, try such offender summarily and sentence him to imprisonment for a term which may extend to three months, or to fine which may extend to five hundred rupees, or with both.

(2) XXXX

(3) XXXX

(4) XXXX”

8. A bare perusal of the aforesaid provision would at once reflect that for initiating proceedings under Section 344 of the Code, the following course has to be adopted :

i. While delivering a judgment or passing a final order, the Court (Court of Sessions or Judicial Magistrate First Class) has to express an opinion to the effect

a. that the witness had knowingly or willfully given false evidence or had fabricated false evidence;

b. that such false evidence was given with the intention that such evidence should be used in such proceedings;

c. that it is necessary and expedient in the interest of justice that the witness should be tried summarily.

ii. Then, the Court shall issue a show cause to the witness as to why he should not be punished for the offence of 'perjury'.

iii. In case, the Court does not satisfy with the explanation of the offender, the Court may thereafter try such offender summarily, and if the offender is found guilty, sentence him as prescribed in Section 344 of the Code itself.

9. The Hon'ble Apex Court in the case of **Mahila Vinod Kumari Vs. State of M.P.**, reported in **2009(1) Mh.L.J. (Cri.) 261**, a landmark judgment of the Hon'ble Apex Court on Section 344 of the Code, reiterated the conditions as mandated in Section 344 of the Code. The relevant para 8 in the said judgment reads thus :

"8. For exercising the powers under the section the Court at the time of delivery of judgment or final order must at the first instance express an opinion to the effect that the witness before it has either intentionally given false evidence or fabricated such evidence. The second condition is that the Court must come to the conclusion that in the interest of justice the witness concerned should be punished summarily by it for the offence which appears to have been committed by the witness. And the third condition is that before commencing the summary trial for punishment the witness must be given reasonable opportunity of showing cause why he should not be so punished. All these conditions are mandatory. [See Narayanswamy vs. State of Maharashtra, (1971) 2 SCC 182]."

10. The Single Bench of this Court in the case of **Sanjay S/o Baburao Gitte Vs. The State of Maharashtra (Criminal Appeal No. 307/2016 decided on 05/05/2017)** emphasised on the point as to when the proceedings under Section 344 of the Code has to be launched. In this judgment, the learned Single Judge made it clear that for initiating proceeding under Section 344 of the Code, mere giving of false evidence is not sufficient as in judicial proceedings, many a times the Court would come across witnesses making contrary statements. The Court further cautioned that it is only when the Court is of the opinion that a witness has “willfully or intentionally” given false evidence and the Court considers that action against such person is necessary in the interest of justice then only such action is contemplated. For ready reference, the relevant para of the said judgment reads thus :

“16. For initiating proceeding u/s 344 of Cr.PC. and punishing person u/s 193 of Cr.PC. mere giving false evidence is not sufficient. There are many instances in judicial proceedings when Court would come across witnesses making contrary statements. It would not be advisable nor feasible to lodge proceeding against all such witnesses. It is only when the Court is of the opinion that a witness has "willfully or intentionally" given false evidence and the Court considers that action against such person is necessary in the interest of justice then only such action is contemplated. As discussed, admission given by the appellant that certain facts deposed by him in his examination in chief were not correct and deceased had no ill treatment and harassment, cannot be treated as intentional act of the accused to depose falsely.”

11. The object of Section 344 of the Code is to facilitate expeditious trial of offences of giving or fabricating false evidence which come to the notice of the Court at the time of delivery of any judgment or final order. Section 344 of the Code provides an additional mode of trying and punishing offenders for giving or fabricating false evidence and where the Court considers that it is likely to raise complicated questions or the act otherwise deserve more serious punishment or where action is considered expedient even before the trial reaches the stage of judgment or final order it is open to the Court to direct initiation of proceedings under the ordinary provisions contained in the Code.

12. The procedure as contemplated under Section 344 of the Code is summary trial. In summary trial, as per Section 262 of the Code, the procedure for the trial of summons case shall be followed. Accordingly, when the accused appears or is brought before the Court, the particulars of the offence shall be stated to the accused, and he shall be asked whether he pleads guilty or has any defence to make. If the accused pleads guilty, the Court shall record the plea, as nearly as possible, in the words used by the accused and may, in its discretion, convict him/her thereon. In case, the accused does not plead guilty, then as per Section 264 of the Code in every case tried summarily, the Court shall record the substance of the evidence, and thereafter a judgment containing a brief statement of the reasons for the finding.

13. Now coming back to the facts of the present case, in this case, it is the grievance of the appellant/accused that even though he had pleaded not guilty, the learned trial Court, without recording the substance of evidence, as mandated under Section

264 of the Code, straight away passed the judgment of conviction. A perusal of the record, especially the impugned judgment, would reflect that after reading over the particulars of the offence to the appellant/accused, the trial Court recorded the plea of the appellant/accused. The appellant/accused pleaded not guilty of the offence. The learned trial Court thereafter straight away passed the judgment of conviction against the appellant/accused. For ready reference, Section 264 of the Code is reproduced below :

“264. Judgment in cases tried summarily. - In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgment containing a brief statement of the reasons for the finding.”

14. With regard to necessity of recording of the substance of evidence separately during summary trial, the Division Bench of this Court in the case of **Krishna Nayar Ram Nayar Vs. State**, reported in **(1959) 61 Bom. L.R. 684**, has observed thus :

“XXXX the substance of the evidence is to be recorded at the time when the evidence is given in Court. To embody the substance of the evidence in a judgment from memory or from short notes made at the time when evidence was given does not amount to compliance with s. 264. XXXX”

15. This Court way back in the year 1928 in the case of **Emperor Vs. Nurudin Sheikh Adam**, reported in **(1928) 30 Bom. L.R. 954**, held that failure to observe the condition prescribed by S.

264 prejudices the accused, so also it is necessary for the appellate Court to decide the appeal. The relevant para of the judgment reads thus :

“We think, however, that the failure of the Bench to observe the condition prescribed by s. 264 is one that did, in fact, prejudice the accused, because it prevents the proper disposal of the appeal that he was entitled to make. The appellate Court should know the substance of the evidence that had been given, so as to be in a position to decide the appeal on the merits, and it is not proper to decide the appeal in the way the District Magistrate has done.”

16. In the case of **Mahila Vinod Kumari** (*supra*), the appellant, a victim of rape, had admitted before the trial Court that she had lodged a false case against the accused. In that case, the trial Court directly recorded her conviction without recording substance of evidence after following the other necessary requirements, and the Hon’ble Apex Court confirmed her conviction under Section 344 of the Code.

17. In the case in hand, the appellant never admitted that he gave the false statements. In such a case, it was necessary for the trial Court to give him an opportunity to prove his defence. The learned trial Court recorded the finding that the diagonally opposite statements of the appellant on oath, i.e., the statement which was recorded under Section 164 of the Code and the evidence before the Court, one of them must have been false, and therefore, the appellant is liable for the offence of perjury. However, in light of the

above discussion, such a course could not have been adopted. The order passed under section 344 is appealable under Section 451 of the Code. In fact, the appellant is before this Court in appeal. In the absence of substance of evidence on record, it is difficult for this Court to comprehend any case against the appellant.

18. In view of the ratio in the case of **Emperor V/s Nurudin** (*supra*), the procedural irregularity in this case has caused prejudice to the appellant. A conviction resulting from an unfair trial is contrary to our concept of justice. This Court would not have directed re-trial, however, considering the fact that the appellant was the sole eye-witness to the incident, and at his instance, the FIR came to be lodged, and during trial, he resiled from his earlier statement recorded under Sections 161 and 164 of the Code, which certainly has an adverse impact upon the administration of justice. Therefore, it is necessary and expedient in the interest of justice to deal with such witness in accordance with law. The Division Bench of this Court recently in the case of **Saraswati w/o Ganpat Landge Vs. The State of Maharashtra (Criminal Appeal No. 40/2015 decided on 19/01/2021)** expressed a grave concern and opined that the trial Courts shall resort to initiate proceedings under Section 344 of the Code in appropriate cases.

19. In the conspectus of the above discussion, re-trial from the stage of recording of substance of evidence is necessary. However, the gesture exhibited and the efforts put in by the learned trial Court in initiating proceedings under Section 344 of the Code deserves appreciation.

20. In such circumstances, this Court is inclined to allow the appeal in part and proceed to pass the following order :

ORDER

- i. The Criminal Appeal is partly allowed.
- ii. The judgment dated 30/06/2008 in Misc. Criminal Application No. 135/2008 is quashed and set aside. The conviction of the appellant is set aside.
- iii. The matter is remanded back to the trial Court for re-trial from the stage of recording of substance of evidence.
- iv. The trial Court to decide the case on its own merits without being influenced by any of the observations noted above.
- v. The parties to appear before the trial Court on 15/04/2021.

(JUDGE)

Sumit